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In the Supreme Court of the United States

OCTOBER TERM, 1954

THOMAS QUINN, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES

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INDEX

	Page
Opinions below	1
Jurisdiction	1
Questions presented	2
Statutes involved	3
Statement	5
Summary of argument	19

Argument:

I. Petitioner did not claim the privilege against self-incrimination	28
A. Petitioner did not claim the privilege against self-incrimination by adopting Fitzpatrick's statement because Fitzpatrick did not claim the privilege	28
B. In any event, it was not error for the Court of Appeals to remand the case for a retrial on the question whether petitioner claimed the privilege	35
II. The question of whether petitioner claimed the privilege against self-incriminatic . is not controlled by principles of res judicata or collateral estoppel	36
III. Petitioner's refusal to answer whether he was or had ever been a member of the Communist Party was with knowledge that the Committee was requiring him to answer	40
A. Petitioner understood that the Committee had rejected his objections to its question, and was requiring him to answer	41
B. In any event, it was not error for the Court of Appeals to direct a retrial on the question of whether petitioner understood that he was required to answer	43

Argument—Continued

Page

IV. Petition was not entitled to a dismissal of the indictment because of the presence of government employees on the grand jury, nor did his proffer entitle him to a hearing on that issue 43
A. The standards of bias..... 44
B. By the standards properly applicable in the disqualification of grand jurors for bias, the petitioner's allegations are insufficient 53
1. The allegations on the present record 53
2. The showing thus made was insufficient to require dismissal of the indictment..... 57
3. A hearing was properly denied. 64
C. The issue of possible bias loses significance in the present case because no grand jury would have failed to return an indictment..... 68
V. The Committee on Un-American activities was empowered to require petitioner to answer the question involved here..... 70
Conclusion 80

CITATIONS

Cases:

Adler v. *Board of Education*, 342 U.S. 485..... 27, 71
American Communications Assn. v. *Douds*, 339 U.S. 382 .....27, 71, 76
Bain, Ex parte, 121 U.S. 1..... 50
Ballard v. *United States*, 329 U.S. 187..... 50
Bigelow v. *Old Dominion Copper Mining & Smelting Co.*, 225 U.S. 111..... 37
Bridges v. *United States*, 346 U.S. 209..... 55
Bryan v. *United States*, 338 U.S. 552..... 36
Carlson v. *Landon*, 342 U.S. 524..... 27, 71
Cassell v. *Texas*, 339 U.S. 282..... 23, 50
Cleveland v. *United States*, 146 F. 2d 730, affirmed, 329 U.S. 14..... 47

Cases—Continued

	Page
Coblentz v. *Maryland*, 164 Md. 558, 166 Atl. 45	45
Coffey v. *United States*, 116 U.S. 436	37
Collins v. *State*, 3 Ala. App. 64, 67, 58 So. 80	45
Dennis v. *United States*, 339 U.S. 162	24, 25, 57, 60, 62
Dennis v. *United States*, 341 U.S. 494	27, 71
Dennis Record, No. 14, Oct. Term, 1949	60, 61
Dennis v. *United States*, No. 336, Oct. 1950 Term, brief, pp. 176-192	74
Emspak v. *United States*, 203 F. 2d 54, pending on certiorari, No. 9, this Term,	3, 18, 22, 26, 29, 40, 70, 78, 79
Frank v. *Mangum*, 237 U.S. 309	37
Frazier v. *United States*, 335 U.S. 497	54
Hale v. *Henkel*, 201 U.S. 43	50
Harisiades v. *Shaughnessy*, 342 U.S. 580	27, 71
Hernandez v. *Texas*, 347 U.S. 475	50
McGrain v. *Daugherty*, 273 U.S. 135	26, 71
Morrison v. *United States*, 71 F. 2d 358, certiorari denied, 293 U.S. 589	69
People v. *Kempley*, 205 Cal. 441, 271 Pac. 478	46
People v. *Prior*, 268 App. Div. 717, 54 N.Y.S. 2d 150, affirmed 294 N.Y. 405, 63 N.E. 2d 8	45
Reichert, State ex rel. v. *Youngblood*, 73 N.E. 2d 174 (Ind.)	46
Remington v. *United States*, 191 F. 2d 246, certiorari denied, 343 U.S. 907	46, 49, 64
Rice v. *State*, 204 Ark. 236, 161 S. W. 2d 401	45
Ruthenberg v. *United States*, 245 U.S. 480	52
Schenck v. *United States*, 249 U.S. 47	77
Shreve v. *United States*, 77 F. 2d 2, certiorari denied, 269 U.S. 654	69
Sinclair v. *United States*, 279 U.S. 263	27, 71
State v. *Easter*, 30 Ohio St. 542	45
Strauder v. *West Virginia*, 100 U.S. 303	51
Thiel v. *Southern Pacific Co.*, 328 U.S. 217	50
United States v. *American Medical Association*, 26 F. Supp. 429	66
United States v. *Benson*, 31 Fed. 896	69
United States v. *Bryan*, 339 U.S. 323	29
United States v. *Caldwell*, 8 Alaska 117	45

Cases—Continued

	Page
United States v. *Fields*, 6 F.R.D. 203	58
United States v. *Fitzpatrick*, 96 F. Supp. 491	36
United States v. *Fujimoto*, 102 F. Supp. 890	48
United States v. *Murdock*, 284 U.S. 141	19, 29
United States v. *Norris*, 300 U.S. 564	71
United States v. *Oppenheimer*, 242 U.S. 85	37
United States v. *Parker*, 103 F. 2d 857, certiorari denied, 307 U.S. 642	69
United States v. *Rintelen*, 235 Fed. 787	44, 48
United States v. *Rumely*, 345 U.S. 41	74
United States v. *Smyth*, 104 F. Supp. 283	44, 48
United States v. *White*, Fed. Cas. No. 16,679 (C.C.D.C.)	48
United States v. *Williams*, Fed. Cas. No. 16,716 (C.C.D.Minn.)	45
Vajtauer v. *Commissioner*, 273 U.S. 103	29
Viereck v. *United States*, 318 U.S. 236	74
Wagner v. *United States*, 67 F. 2d 656	69

Constitution and Statutes:

First Amendment	20, 30, 33
Fifth Amendment	20, 28, 30, 31, 33
Communist Control Act of 1954 (Pub. Law 637, 83d Cong., 2d Sess., 68 Stat. 775	75
Foreign Agents Registration Act of 1938 (52 Stat. 631, 22 U.S.C. 611)	72, 74
Internal Security Act of 1950, 50 U.S.C. 781	55
New York Code of Criminal Procedure:	
Sec. 239(6)	45
Sec. 376(2)	45
Subversive Control Act of 1950	74
Voorhis Act (54 Stat. 1201, 18 U.S.C. 2386)	74
2 U.S.C. 192	41
28 U.S.C. 2106	36

Miscellaneous:

24 American Jurisprudence, Grand Jury, § 10	44
Annotation, *Prejudice of Member of Grand Jury against Defendant as Ground of Attack on Indictment*, 88 A.L.R. 899	44

Miscellaneous—Continued

	Page
Carr, The House Committee on Un-American Activities (1952), pp. 13-17	72
78 Cong. Rec. 4934	72
93 Cong. Rec. 3815	54
Executive Order 9835 (President's Loyalty Order)	53
Federal Rules of Criminal Procedure:	
Rule 6	58
Section (b)	3, 24
Section (c)	4, 67
Section (d)	4, 66
Section (e)	4, 66
Section (f)	5
Freeman on *Judgments* (5th ed.), Section 451	38
Hearings, H. Comm. on Un-American Activities, 81st Cong., Hearings Regarding Communist Infiltration of Labor Unions, pp. 541-542	7, 76
House Rule XI (q)	9
H. Rep. 153, 75th Cong., 1st Sess.	72
H. Rep. 1844, 80th Cong., 2d Sess.	74
H. Rep. 2651, 83d Cong., 2d Sess., p. 18	75
H. Res. 282, 75th Cong., 3d Sess.	72
69 Monthly Labor Review (1949) pp. 640-644	34
New York Times, November 2 and 3, 1949	34
Orfield, *Criminal Procedure from Arrest to Appeal* (1947), 144-145	48, 69
Ogden, *The Dies Committee* (1943), pp. 38-46	72
Restatement of Judgments:	
Section 99	38
Scope Note preceding Chapter I	38
Sen. Rep. 1358, 81st Cong., 2d Sess., pp. 4-6	74
8 Wigmore, *Evidence* (3d ed. 1940), Sec. 2268	29

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BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinions of the Court of Appeals (R. 163-212) are reported at 203 F. 2d 20. The opinions of the District Court denying petitioner's motions to dismiss the indictment (R. 63-78) are reported at 95 F Supp. 1010, 1012. The oral opinion of the District Court at the close of the trial (R. 130-139) is not reported.

JURISDICTION

The judgment of the Court of Appeals was entered on December 19, 1952, and a petition for re-

hearing *en banc* was denied on April 13, 1953 (R. 213, 213). The petition for a writ of certiorari was filed on May 13, 1953, and granted on June 7, 1954 (R. 219). The jurisdiction of this Court rests on 28 U. S. C. 1254(1). See also former Rule 37(b)(2) and Rule 45(a), F. R. Crim. P.

QUESTIONS PRESENTED

1. Whether the Court of Appeals should have directed an acquittal instead of remanding for a new trial on the issue of whether petitioner sufficiently claimed the privilege against self-incrimination when he adopted statements made by another witness who had appeared before the same Congressional committee the preceding day.

2. Whether under principles of *res judicata* and collateral estoppel, Fitzpatrick's acquittal on the ground that his statement, later adopted by petitioner, constituted an assertion of the privilege against self-incrimination precludes an independent determination in this case of whether petitioner claimed the privilege.

3. Whether the Court of Appeals should have directed an acquittal instead of remanding for a new trial on the issue of whether petitioner's refusal to answer was with knowledge that the Committee was requiring him to answer.

4. The twenty grand jurors who concurred in finding the indictment included ten government employees and two wives of government employees. The question presented is whether petitioner made a sufficient showing of bias on the part of these

twelve grand jurors to entitle him to dismissal of the indictment or to a hearing on the issue.

5. Whether the Resolution creating and defining the powers of the House Committee on Un-American Activities authorized the Committee to ask petitioner whether he was a past or present member of the Communist Party; and, if it did, whether the Resolution, as thus construed, is unconstitutional, in that (a) it exceeds the investigatory or legislative power of Congress, (b) it is too vague and indefinite, or (c) it abridges rights secured to petitioner by the First Amendment.

STATUTES INVOLVED

The relevant statutes, resolutions, and rules are set out in the Brief for the United States in *Emspak* v. *United States*, No. 9, O. T. 1954, with the exception of the pertinent portions of Rule 6 of the Federal Rules of Criminal Procedure, which are as follows:

> Rule 6. The Grand Jury.
>
> * * * * *
>
> (b) OBJECTIONS TO GRAND JURY AND TO GRAND JURORS.
>
> * * * * *
>
> (2) *Motion to Dismiss.* A motion to dismiss the indictment may be based on objections to the array or on the lack of legal qualification of an individual juror, if not previously determined upon challenge. An indictment shall not be dismissed on the ground that one or more

members of the grand jury were not legally qualified if it appears from the record kept pursuant to subdivision (c) of this rule that 12 or more jurors, after deducting the number not legally qualified, concurred in finding the indictment.

(c) FOREMAN AND DEPUTY FOREMAN.

* * * The foreman shall have power to administer oaths and affirmations and shall sign all indictments. He or another juror designated by him shall keep a record of the number of jurors concurring in the finding of every indictment and shall file the record with the clerk of the court, but the record shall not be made public except on order of the court. * * *

(d) WHO MAY BE PRESENT. Attorneys for the government, the witness under examination, interpreters when needed and, for the purpose of taking the evidence, a stenographer may be present while the grand jury is in session, but no person other than the jurors may be present while the grand jury is deliberating or voting.

(e) SECRECY OF PROCEEDINGS AND DISCLOSURE. Disclosure of matters occurring before the grand jury other than its deliberations and the vote of any juror may be made to the attorneys for the government for use in the performance of their duties. Otherwise a juror, attorney, interpreter or stenographer may disclose

matters occurring before the grand jury only when so directed by the court preliminarily to or in connection with a judicial proceeding or when permitted by the court at the request of the defendant upon a showing that grounds may exist for a motion to dismiss the indictment because of matters occurring before the grand jury. No obligation of secrecy may be imposed upon any person except in accordance with this rule. The court may direct that an indictment shall be kept secret until the defendant is in custody or has given bail, and in that event the clerk shall seal the indictment and no person shall disclose the finding of the indictment except when necessary for the issuance and execution of a warrant or summons.

(f) FINDING AND RETURN OF INDICTMENT. An indictment may be found only upon the concurrence of 12 or more jurors. The indictment shall be returned by the grand jury to a judge in open court. If the defendant has been held to answer and 12 jurors do not concur in finding an indictment, the foreman shall so report to the court in writing forthwith.

STATEMENT

On November 20, 1950, the petitioner, Thomas Quinn, was indicted by a grand jury of the United States District Court for the District of Columbia, for having wilfully refused to answer the question "whether he then was or had ever been a member

of the Communist Party" before a duly created subcommittee of the Committee on Un-American Activities of the House of Representatives, in violation of the provisions of 2 U. S. C. 192 (R. 3).

The petitioner pleaded not guilty (R. 4), and moved to dismiss the indictment (R. 4-6). One of the contentions made in this motion was that the indictment was invalid because fewer than twelve members of the grand jury which returned it were impartial, for the reason that ten of its members were government employees and two were wives of government employees. In the alternative, a hearing was sought so that the bias in the grand jurors could be shown (R. 6). The motion was supported by affidavits of petitioner's counsel to the effect that, by virtue of the atmosphere created and exemplified by such matters as Executive Order 9835 (the President's Loyalty Order), and the enactment of the Internal Security Act of 1950, the climate of opinion in Washington was such that government employees would have hesitated to vote against the return of an indictment in this case (R. 15-17, 34-44). This affidavit was in turn supported by nine newspaper clippings, some with unsigned articles, and others reflecting the opinions of named columnists, some of which expressed the view that the loyalty program was having adverse effects on the morale of government employees (R. 45-63).

The petitioner's motion on this point was denied on the ground that there had been no showing of actual bias on the part of the jurors, or of circum-

stances which, either with or without the hearing sought by petitioner, would indicate that government employees would not be suitable grand jurors (R. 63-66).

Later, or the trial of the case, the following was stipulated or shown:

The petitioner was summoned by the Committee to appear as a witness at a hearing conducted on August 9, 10 and 11, 1949, in Washington, D. C. At the opening of the Committee's hearing on August 9, 1949, the Committee's counsel, Mr. Tavenner, made the following statement:[1]

> Mr. Tavenner. Mr. Chairman, the purpose of this hearing is to inquire into the question of Communist affiliation or association of certain members of Local 601 of the United Electrical, Radio and Machine Workers of America, CIO, which is engaged in work at industrial plants important to the national defense.
>
> The advisability of recommending legislation providing for security standards, and the advisability of tightening present security requirements in industrial plants working on certain Government contracts, was considered by the committee in both its open and execu-

[1] The exact language of the Committee counsel at the hearings does not appear in the record. It does appear in the published Committee hearings. Hearings, House Committee on Un-American Activities, 81st Cong., Hearings Regarding Communist Infiltration of Labor Unions, pp. 541-542. It was stipulated that the printed hearing transcript is accurate (R. 92).

tive sessions on June 6, 1949, as a result of the testimony of Leona and Joseph Franey and Loren G. Haas.

It will be remembered that Mr. Wood, the chairman of this committee, offered H. R. 3903, section 2 of which would make it an offense for any individual employed in connection with the performance of any national defense contract "(1) to become or remain a member of, or affiliated with, the Communist Party of the United States of America, or any organization which shall have been designated as subversive by the Attorney General; (2) to contribute funds or services to the Communist Party of the United States of America or to any organization which shall have been designated as subversive by the Attorney General; or (3) to advise, counsel, or urge any other individual employed in connection with the performance of any national defense contract to perform, or to omit to perform, any act if such act or ommission would constitute a violation of clause (1) or (2) of this section." This bill was referred to this committee.

It is the further purpose of this hearing to develop facts for the committee's consideration in connection with this resolution.[2]

* * * * *

---

[2] At petitioner's trial, the Committee's counsel was asked (R. 116-117):

Q. Do you care to make any further amplification of that statement of the purpose of? A. I may add that in connection with the investigation which the staff had

It is conceded that petitioner was aware of the purpose of the hearing (R. 19).

The basic authority of the Committee to conduct investigations and to subpoena witnesses in connection therewith depends on House Rule XI (q) (adopted for the 81st Congress in House Resolution No. 5), the crucial language of which authorizes the Committee on Un-American Activities to make, from time to time——

> * * * as a whole or by subcommittee * * * investigations of (i) the extent, character, and objects of un-American propaganda activities in the United States, (ii) the diffusion within the United States of subversive and un-American propaganda that is instigated from foreign countries or of a domestic origin and attacks the principle of the form of government as guaranteed by our Constitution, and (iii) all other questions in relation thereto that would aid Congress in any necessary remedial legislation.

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made, it was discovered that there were no security standards applied by the Army to members of the National Organization of the UE. By that I mean persons who held national positions in the National Organization as distinguished from the local. It was discovered that the Atomic Energy Commission recognized the advisability and necessity of applying the security standards to those officers. That entire matter of construction, or difference of construction by the Army and by the Atomic Energy Commission was involved in the hearings, though testimony relating to that particular subject did not come out in this particular hearing other than to lay the foundation for it by showing who were members of the National Organization and what, if any, their communist affiliations may be.

Pursuant to the Committee's subpoena, petitioner appeared before a subcommittee of the Committee on August 11, 1949, and identified himself as a field organizer for the International Union of the United Electrical, Radio and Machine Workers of America (hereafter referred to as UE) and a member of Local 601 of that Union, which represented the employees of the Westinghouse Electric Corporation (R. 96-97). Thereafter, he was asked, and he answered, several other questions relating to the succession of posts he had held in the union and to his present position as chairman of the Western Pennsylvania Civil Rights Congress. He was then asked "Are you now or have you ever been a member of the Communist Party" (R. 97). The following colloquy thereupon ensued (R. 97-98):

> Mr. Quinn: I would like to make a statement along the lines that Mr. Fitzpatrick made yesterday in regard to a question of that nature. I feel that the political beliefs, opinions, and associations of the American people can be held secret if they so desire.
>
> Mr. Wood. And for those reasons you decline to answer the question?
>
> Mr. Quinn. I didn't say I was declining to answer the question. Before I do answer the question, I should like to say that I support the position taken by Brother Fitzpatrick yesterday.
>
> Mr. Wood. Did you hear his statement yesterday?

Mr. Quinn. Yes; I did.

Mr. Wood. Do you support it in its entirety?

Mr. Quinn. In its entirety.

Mr. Wood. Is there anything else you want to add to it?

Mr. Quinn. No; I don't.

Mr. Wood. Will you accept it as the expression of your views, then?

Mr. Quinn. You may. I may add I feel I have no other choice in this matter, because the defense of the Constitution, I hold sacred. I don't feel I am hiding behind the Constitution, but in this case I am standing before it, defending it, as small as I am.

Mr. Wood. Having made that statement and subscribed to the sentiments expressed by the witness yesterday to whom you referred, will you now answer the question whether you are now or have ever been a member of the Communist Party?

Mr. Quinn. I hold that the Constitution holds sacred the rights of people——

Mr. Wood. You have stated your position. Having enunciated your sentiments and your position, will you now answer the question whether you are now or ever have been a member of the Communist Party, or do you decline to answer.

Mr. Quinn. I decline to discuss with the committee questions of that nature.

Mr. Wood. Proceed, Mr. Tavenner.

Mr. Tavenner. I believe in the light of that answer it is not necessary to ask you any further questions relating to those matters * * *.

The record shows that on August 10, 1949, the day preceding Quinn's appearance, the subcommittee had questioned Thomas J. Fitzpatrick, chief steward of Local 601. Fitzpatrick, before being asked other than identification questions, was allowed to make an extended statement which was highly critical of the Committee, and alleged, in effect, that the Committee was attempting to smear the local union, that its investigation was "rigged by a Jesuit priest", and that its purpose was to influence union elections and wage negotiations with the Westinghouse Company (R. 103-106). His statement concludes (R. 106-107):

I will answer all honest questions put to me, but I have no intention of joining with the people who seek to destroy the Constitution of this country, whether witnesses or anybody else. To me, the Constitution of this country is not a scrap of paper. It is something to be maintained. I have two sons. I want them to have the same freedom and rights that I have enjoyed. If I can't leave this world a better world, I want to leave it just as good.

The Constitution of this country provides certain protection for minorities and gives the privilege for people to speak and think as they

feel they should and want to. It also gives the privilege that people can have opinions or beliefs that may be unpopular. In my opinion, it gives them the right to hold those opinions secret if they so desire. This is a protection of the First Amendment to the Constitution, supplemented by the Fifth Amendment.

Mr. Wood. What is it?

Mr. Fitzpatrick. The right of the people guaranteed by the Constitution.

Fitzpatrick, thereafter being questioned, was asked by Committee counsel whether he was or ever had been a member of the Communist Party. He responded as follows (R. 107-108):

Mr. Fitzpatrick. Mr. Chairman, in my opening remarks I gave quite a bit of my attitude on this question. I say that this committee has no right to pry into my mind.

Mr. Wood. We are not concerned with your opinion of the committee. We have asked you a simple question. Do you want to answer it or not?

Mr. Fitzpatrick. I am answering it, Mr. Chairman.

Mr. Wood. We don't have the time for a long dissertation.

Mr. Fitzpatrick. I think I have a right to answer it in my own way.

Mr. Wood. The question can be answered "Yes" or "No," or you can decline to answer it.

Mr. Fitzpatrick. Being just a common workingman, I will answer it in my own words. I don't think the committee has the right to dictate the choice of my words in answering it.

Mr. Wood. We are not attempting to do that. You may answer or decline to answer.

Mr. Fitzpatrick. I will answer the question. The Constitution guarantees the right to me and every other citizen to have beliefs, whether they are popular or unpopular, and to keep them to themselves if they see fit, and I have no intention of being a party to weakening or destroying that protection in the Constitution. I feel when I take this position that I am one of the real Americans, and not like some of the phonies who appear here.

Mr. Wood. Now will you answer the question?

Mr. Fitzpatrick. I have answered the question.

Mr. Wood. It is not an answer at all.

Mr. Fitzpatrick. That is my answer.

Mr. Wood. Do you mean that is the only answer you are going to give?

Mr. Fitzpatrick. That is the way it has to be answered, according to my conscience.

Thereafter Fitzpatrick kept repeating that he was not refusing to answer the question but that he had answered it. On being asked similar questions he repeated that he had already answered them by

his statements already given (R. 108-114). For example (R. 108):

> Mr. Fitzpatrick. The answer to my previous question is the answer to this question. I have no intention of permitting this committee to abridge my constitutional rights on political opinions, associations, who I work with, who I meet with, what I read or think, or anything of that kind.

On another occasion he was asked whether he had requested one Copeland to apply for membership in the Communist Party, and his answer was as follows (R. 110):

> Mr. Fitzpatrick. Mr. Chairman, do I have to give you my answer again?
>
> Mr. Wood. I just want to know whether you did that one thing.
>
> Mr. Fitzpatrick. I say if I did or if I did not, regardless of what I did, it is not the affair of this committee to pry into this kind of action.
>
> Mr. Wood. And for the reason do you decline to answer the question?
>
> Mr. Fitzpatrick. I stand on the protection of the Constitution, the First and Fifth Amendments.
>
> Mr. Wood. And for those reasons decline to answer the question further?
>
> Mr. Fitzpatrick. I have answered the question.

Fitzpatrick said that he would answer any question regarding his actions, but would give no answer to any question seeking to elicit his political beliefs, activities, and associations, in the following colloquies:

> Mr. Fitzpatrick. Mr. Chairman, if you want to ask me questions about my actions of loyalty, question my loyalty, you have a right to do so, and I will answer them. So far as my political opinions, I have stated my position on that.
>
> * * * * *
>
> I will not talk about my association and actions with people who I know, what I did, or anything else. [R. 109.]
>
> * * * * *
>
> I have no intention of discussing my political actions or activities with this committee, for the reasons that I have stated before [R. 110].
>
> Mr. Fitzpatrick. I came here and I stated that if you have any questions about any actions that I have committed, I will answer. So far as my beliefs, my political activities, my associations, affiliations, what I read, those are rights guaranteed to me and every other citizen of this Nation. [R. 111.]
>
> * * * * *

At the close of the trial, the trial court found the petitioner guilty, and sentenced him to six months in jail and a fine of $500 (R. 158, 81). In

its opinion, the trial court concluded, *inter alia*, that (1) a question as to petitioner's membership in the Communist Party was pertinent to the matter under investigation, (2) that petitioner refused to answer that question, and (3) that petitioner, in so refusing, did not claim the privilege against self-incrimination since he could not do so by his reference to Fitzpatrick's statement (R. 133-138).[3]

The Court of Appeals, sitting *en banc*, reversed the judgment of the District Court and remanded the case for a new trial (R. 162-213). Its action was based principally on its rejection of the trial court's view that the privilege could not be claimed by adoption of Fitzpatrick's statement. The majority held that no specific formula is required to claim the privilege as a matter of law, and that, where a witness makes an equivocal statement, a question of fact, or at least a mixed question of law and fact, is presented which should be resolved in the first instance by the trial judge in the light of the factual setting of the particular case. In this case, the court held that the sufficiency of Quinn's claim rested on the sufficiency of Fitzpatrick's claim made the day before and which was not considered by the trial judge. The court refused to consider

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[3] The trial court stated (R. 138): "Since the privilege is personal, the defendant must assert it himself, since another may not know what is in a defendant's mind at the time he is called before Congress to testify on pertinent matters, to proper inquiry, and therefore, one may not, by reference, assert that privilege."

this question as an initial proposition and held that in a new trial the trial judge should determine (R. 168) "* * * whether Fitzpatrick's statement, in full text and context, related only to the claim of the rights of free speech and thought under the First Amendment, or whether an auditor could detect an intention to claim the privilege against self-incrimination, protected by the Fifth Amendment."

The court rejected the contention that, before a witness may be held in contempt for failing to answer a question, he must be specifically directed to answer, citing its decision in *Emspak* v. *United States*, 203 F. 2d 54, decided the same day, pending on certiorari, No. 9, O. T. 1954. It observed, however, that a factual question as to whether petitioner had the intent to refuse to answer the question, or whether he thought the committee had abandoned the question, remained unresolved, and should be determined by the trial judge on retrial (R. 171-172).

The majority rejected, as it had in the companion *Emspak* case (203 F. 2d at 56), the contention that petitioner should have been afforded a hearing on his motion to dismiss the indictment for the reason that ten members of the grand jury were Government employees and two were wives of Government employees (R. 172). Judges Bazelon and Edgerton thought that petitioner was entitled to a hearing on that issue (R. 172-186).

Judge Miller, in a dissenting opinion joined by

Judges Proctor and Clark (R. 199-212), was of the view that the trial court did not rest its holding only on the premise that the privilege against self-incrimination could not be asserted by reference, but also on a correct finding that Fitzpatrick's prior statement did not constitute a claim of the privilege. He thus saw no reason to remand the case for a new trial.

SUMMARY OF ARGUMENT

I

The petitioner contends that the Court of Appeals should have directed his acquittal on the ground that he had claimed the privilege against self-incrimination when he was asked by the Committee whether he was a present or past member of the Communist Party, rather than remanding the case for retrial on the issue of whether in fact petitioner claimed the privilege. The petitioner asserts that he adequately claimed the privilege by referring to or adopting the statement of Fitzpatrick, a prior witness before the Committee. We concede that a witness may assert the privilege by appropriate adoption of a claim of the privilege made by another witness. We contend, however, that Fitzpatrick did not claim the privilege and that, therefore, petitioner did not claim it by adopting Fitzpatrick's statement.

The privilege against self-incrimination is waived unless it is asserted before the tribunal which is questioning the witness. *United States* v. *Murdock*, 284 U. S. 141. Similarly, while the privi-

lege need not be claimed in the precise words of the Fifth Amendment, it must be asserted in such a manner as to inform the tribunal that the witness is claiming the privilege, so that uncertainty as to the witness' position will not deprive the tribunal of information which it is otherwise entitled to obtain. Fitzpatrick's statement consists of a bitter attack upon the Committee, followed by repeated assertions of political rights of speech, thought and association, coupled with an asserted right to privacy about such matters. Fitzpatrick never suggested that responsive answers might endanger him. In this immediate context, Fitzpatrick's oblique references to "the First Amendment to the Constitution, supplemented by the Fifth Amendment" and to the "First and Fifth Amendments" did not constitute an adequate claim of the privilege against self-incrimination.

Moreover, petitioner's statement in adopting Fitzpatrick's statement strongly suggests that petitioner regarded the latter's statement as an assertion of First Amendment rights, rather than a claim of the privilege. It should be noted also that both petitioner and Fitzpatrick had immediate and compelling motives, arising out of their union activities, to refrain from making clear and unequivocal claims of the privilege, and to bury deliberately in a mass of unrelated language their references to the Fifth Amendment. Under these circumstances, petitioner did not claim the privilege against self-incrimination before the Committee.

Although we believe that petitioner clearly failed to claim the privilege before the Committee, we accept the action of the court below in remanding the case for retrial on that issue. Whether the court below had power to determine this issue as an original matter (since it found that the trial court had not done so), it clearly had discretion not to do so.

II

Petitioner argues that the issue whether he properly claimed the privilege against self-incrimination by reference to Fitzpatrick's statement was already resolved against the Government under principles of *res judicata* and collateral estoppel, because the court which tried Fitzpatrick for contempt of the Committee, before petitioner was tried, held that Fitzpatrick had properly claimed the privilege.

The argument is not sound. First, it should be noted that the Government was foreclosed from taking an appeal to correct the Fitzpatrick judgment and, therefore, should not be precluded from presenting the question to the courts in another case. Second, it is clear that principles of *res judicata* and collateral estoppel apply only to criminal proceedings involving the same parties. Finally, there was, in any event, no such identity of issues in the two cases, Fitzpatrick's and petitioner's, as would justify application of *res judicata* and collateral estoppel principles. For Fitzpatrick's claim in Fitzpatrick's case might well be judged in the light of what Fitzpatrick might have

intended, subjectively. This would not be so with respect to petitioner who could rely only on the objective meaning of Fitzpatrick's words. Moreover, it is far from clear whether petitioner adopted as his own some or all of Fitzpatrick's statements before the Committee. Under these circumstances, the courts below properly treated the issue of whether petitioner had claimed the privilege as one to be determined independently in this case.

III

Petitioner urges that he should have been acquitted because he was not specifically directed to answer the question involved in this case after he had objected to the question. We have set forth in our brief in *Emspak* v. *United States*, No. 9, this Term, our view that a witness before a Congressional committee who objects to a question must be informed that the Committee has rejected his objection and is requiring him to answer, although not in any rigid form of words, before he can be punished for refusal to answer. The record in this case makes it clear that petitioner must have understood that his objection to answering had been rejected by the Committee and that it was requiring him to answer the question. In any event, in the circumstances of this case, it was not error for the Court of Appeals to direct a retrial on this point as well.

IV

Petitioner contends that the presence of 10 government employees and two wives of government

employees among the 20 grand jurors who voted on his indictment required the trial court to grant his motion to dismiss the indictment or, alternatively, a hearing to allow petitioner an opportunity to show that government employees would be unable to act as impartial grand jurors in the case of one cited for contempt by the House Committee on Un-American Activities. We contend that the motion was properly denied.

A. Generally, the courts have held that, in the absence of a controlling statute, bias on the part of a grand juror does not invalidate an indictment. In the few cases where bias of grand jurors has been held to invalidate an indictment, the showing of bias was clear, strong, and personal. General allegations of prejudice in grand jurors will not suffice. These principles reflect not only the historical function of the grand jury to report the knowledge of the community to the courts, but also the practical truth that the functions of the grand jury would be greatly impaired if indictments can be impeached upon allegations of vague or general community prejudices against particular groups.

This Court has considered the composition of grand juries only in cases involving the exclusion of particular groups, such as Negroes, from grand jury service. See, *e.g.*, *Cassell* v. *Texas*, 339 U. S. 282. Decisions of this Court setting aside indictments returned by grand juries from which such groups have been systematically excluded emphasize that the principal protection of an accused lies in the selection of the grand jury from a repre-

sentative panel, rather than in the absence of vague and general prejudices in the other members of the panel.

B. Applying these principles, petitioner's motion to dismiss the indictment, or for a hearing to explore the possibility of bias in government employees serving on the grand jury, was properly denied. The allegations made in the supporting affidavits as to the effect of the loyalty program and related matters, in creating "a miasma of fear among government employees in the District of Columbia," failed to demonstrate that any government employees serving as grand jurors feared, or had any reason to fear, that an honest vote against the return of an indictment in this case would be regarded as evidence of disloyalty or would in any other way prejudice them. The inadequacy of this showing is emphasized by the fact that under Rule 6(b) of the Federal Rules of Criminal Procedure petitioner must show that substantially all government employees serving as grand jurors in a case such as this are, or must be presumed to be, afraid to act in accordance with their oaths as grand jurors. Indeed, the showing made here is simply a detailing of that which was rejected as insufficient in *Dennis* v. *United States,* 339 U. S. 162, even as applied to petit jurors, and is insufficient, *a fortiori,* as applied to the composition of a grand jury.

In requesting a hearing to determine whether there existed such bias on the part of government employees serving on the grand jury, petitioner contended that he was entitled to "inquire into the effect of the President's Loyalty Order upon gov-

ernment employees in general and those in the Grand Jury in particular", and "to demonstrate that the investigations under the President's Loyalty Order inquire into conduct of * * * [government employees'] activities as Grand Jurors or the activities of spouses of Grand Jurors in respect to issues like those involved in the present indictments." Petitioner's request for a hearing on such far-ranging questions is not supported by the showing required by *Dennis* v. *United States, supra.* Moreover, the lack of justification for such a hearing is emphasized by the rigid provisions of Rule 6 of the Federal Rules of Civil Procedure which, by prohibiting disclosure of grand jurors' votes, are designed to protect grand jurors from the precise pressures conjectured by petitioner. Courts do not undertake the unusual procedure of probing the motives of grand jurors upon the basis of a naked assumption that grand jurors and executive officers have joined in violating this legal requirement of secrecy.

C. The significance of possible bias in grand jurors must be measured not only in the light of the fact that the grand jury determines only whether there is probable cause to believe that the accused has committed a crime, rather than the ultimate question of guilt or innocence, but in the light of the issues before the grand jury. The transcript of the Committee's hearing clearly constituted a *prima facie* basis for concluding that petitioner had refused to answer a pertinent question addressed to him by the Committee, and the grand jury could hardly be expected to weigh in its ex parte proceed-

ings the more subtle matters of defense which divided the court below. Under these circumstances, and considering that the bias alleged in the government employees on the grand jury is general, rather than specific and personal, the petitioner cannot show such prejudice as would warrant dismissal of the indictment or require a hearing.

V

We have set forth in the government's brief in *Emspak* v. *United States,* No. 67 last Term, No. 9 this Term, our arguments that the House of Representatives' Resolution creating the Committee on Un-American Activities is valid both on its face and as applied in that case. As applied in this case, we contend that the House of Representatives empowered the Committee to investigate "the extent, character, and objects" of Communist propaganda activities in the United States, that the Committee was thus authorized to conduct an investigation into the presence of Communists in labor unions and, as a part of such investigation, to ask petitioner, a member and organizer of the United Electrical, Radio and Machine Workers of America, whether he was a present or past member of the Communist Party. We further contend that as thus applied the Resolution does not violate the First Amendment.

Each House of Congress may empower its committees to obtain information by compulsion to assist Congress in performing its legislative functions. *McGrain* v. *Dougherty,* 273 U. S. 135;

Sinclair v. *United States*, 279 U. S. 263. Since Congress can legislate with respect to the Communist Party and its activities, *Carlson* v. *Landon*, 342 U. S. 524; *Harisiades* v. *Shaughnessy*, 342 U. S. 580; *Adler* v. *Board of Education*, 342 U. S. 485; *American Communications Association* v. *Douds*, 339 U. S. 382; *Dennis* v. *United States*, 341 U. S. 494, either House may authorize its committees to investigate and obtain information concerning the administration and efficacy of existing legislation relating to Communist activities, as well as the need for new legislation.

The origin and history of the Committee and its predecessors reveal that the House of Representatives, in creating the Committee, specifically intended it to investigate the "extent, character, and objects" of Communist propaganda activities and the "diffusion" of Communist propaganda in the United States. Moreover, Congress has ratified this construction of the resolution (as it is applied here), and at the same time has demonstrated that the Committee's investigations serve a direct legislative purpose, by enacting significant statutes dealing with Communism and based in large part upon the Committee's reports and recommendations.

The Committee clearly was empowered to investigate Communist propaganda activities in labor unions. *American Communications Association* v. *Douds, supra.* As a minimum, it was entitled to inquire to what extent the leadership of petitioner's union was comprised of Communists, what propaganda was employed to recruit them into

the Party, whether they were using their positions of union leadership to recruit others into the Communist Party or otherwise to accept the Party's propaganda objectives, and the ultimate objectives of such propaganda and recruiting activities. Accordingly, the Committee was empowered to require petitioner, a member and organizer of UE, to state (absent a claim of the privilege against self-incrimination) whether he was a present or past member of the Communist Party.

ARGUMENT

I

Petitioner Did Not Claim the Privilege Against Self-incrimination

The petitioner contends that the Court of Appeals should have directed an acquittal on the ground that he properly claimed the privilege against self-incrimination, rather than remanding the case for a retrial on this issue. We contend that petitioner failed to assert the privilege, but we do not challenge the action of the court below in remanding the case for a new trial on the question of whether petitioner adequately claimed the privilege.

A. *Petitioner did not claim the privilege against self-incrimination by adopting Fitzpatrick's statement because Fitzpatrick did not claim the privilege.*

The sole basis for petitioner's contention that he properly claimed the protection of the Fifth

Amendment's privilege against self-incrimination is that he adopted the statement of Fitzpatrick, a prior witness before the same Committee (Pet. Br., pp. 27-44). We concede that the petitioner was entitled to assert the privilege in response to the question as to whether he was a present or past member of the Communist Party. We also concede that petitioner adopted some or all of Fitzpatrick's statement, and that, as the court below held (R. 165-166), one may claim the privilege by appropriate adoption of another's assertion of it. We contend, however, that Fitzpatrick's statement did not constitute or include an assertion of the privilege against self-incrimination, and, accordingly, that petitioner did not claim the privilege by adopting Fitzpatrick's statement.

The privilege against self-incrimination is waived by the failure to assert it. *United States* v. *Murdock,* 284 U. S. 141; *Vajtauer* v. *Commissioner,* 273 U. S. 103, 113; 8 Wigmore, *Evidence* (3d ed. 1940), sec. 2268. As an exception to the fundamental obligation to testify, "so necessary to the effective functioning of courts and legislatures" (*United States* v. *Bryan,* 339 U. S. 323, 331), it must be asserted in clear and unequivocal fashion so that uncertainty and confusion as to the witness's position will not unnecessarily restrict the range of information which the questioning tribunal is entitled to obtain. See the Brief for the United States, pp. 37-39, *Emspak* v. *United States,* No. 9, this Term.

Also, it is clear that a witness who desires the

protection of the privilege against self-incrimination must inform the questioning tribunal that he is claiming the privilege with sufficient precision to distinguish his claim of privilege from any other grounds for refusal to answer which he is asserting or which might be available to him.

Viewed in the light of these principles, it is plain that Fitzpatrick's statement, adopted by petitioner, did not invoke the privilege against self-incrimination. To begin with, this factual question is not, as petitioner states it (Pet. Br. 34-36), whether "The use of the words 'Fifth Amendment' is sufficient to invoke the protection of the privilege." We will assume that the privilege would be invoked if Fitzpatrick had stated that "I refuse to testify on the ground of the Fifth Amendment." Rather, the question is whether Fitzpatrick's coupling of the First *and* Fifth Amendments, in support of his statements of the political rights of minorities and his assertion of a general right of privacy in challenge of the Committee's powers, was sufficient to apprise the Committee that petitioner was claiming the protection of the privilege.

Only a reading of Fitzpatrick's statement (R. 106-114; Statement, *supra,* pp. 12-16) will reveal how thoroughly buried was the claim of privilege which is now put forward. After a bitter introductory attack upon the motives of the Committee (R. 103-106), Fitzpatrick referred to the rights of individuals to hold opinions and beliefs that may be unpopular, and added (R. 107) that:

> In my opinion, [the Constitution] gives them the right to hold those opinions secret if they so desire. This is a protection of the First Amendment to the Constitution, supplemented by the Fifth Amendment.

We submit that in this context this reference to the Fifth Amendment failed to inform the Committee that Fitzpatrick was claiming the protection of the privilege against self-incrimination.

Moreover, in the extensive and related discussion which followed, Fitzpatrick made not the slightest reference to self-incrimination. This omission alone, or in another context, would not be decisive, since a witness is not required to recite verbatim the self-incrimination clause of the Fifth Amendment. But Fitzpatrick not only failed to express any apprehension of danger but repeatedly characterized his position in terms of a lack of power in the Committee to inquire into his political beliefs, activities, and associations (R. 107, 108, 109). It was after Fitzpatrick had thus described his own stand again and again that there occurred his only other reference to the Fifth Amendment, as follows (R. 109-110):

> Mr. Tavenner: Was it the Communist Political Association, then, that you tried to get [Clarence D. Copeland] to join?
>
> Mr. Fitzpatrick: I have given you my answer.
>
> Mr. Tavenner: In other words, you will not

answer whether you did or did not solicit his membership?

Mr. Fitzpatrick: I will not talk about my association and actions with people who I know, what I did, or anything else. I don't think it reflects on my loyalty or disloyalty or anything else.

Mr. Wood: Mr. Fitzpatrick, did you ever at any time during the year 1943 furnish an application blank and request Clarence D. Copeland to sign and make application for membership in the Communist Political Association, or the Communist Party?

Mr. Fitzpatrick: Mr. Chairman, do I have to give you my answer again?

Mr. Wood: I just want to know whether you did that one thing.

Mr. Fitzpatrick: I say if I did or if I did not, regardless of what I did, it is not the affair of this committee to pry into this kind of action.

Mr. Wood: And for that reason do you decline to answer the question?

Mr. Fitzpatrick: I stand on the protection of the Constitution, the First and Fifth Amendments.

In this context, this second reference by Fitzpatrick to the Fifth Amendment did not inform the Committee that he feared his answer would tend to incriminate him. Indeed, it is quite possible that Fitzpatrick did not even intend to claim the privilege.

When petitioner adopted Fitzpatrick's position as his own (R. 97-98), he simultaneously characterized the objection as a right to privacy with respect to political matters. Thus, petitioner stated (R. 97) that:

> I would like to make a statement along the lines that Mr. Fitzpatrick made yesterday in regard to a question of that nature. I feel that the political beliefs, opinions, and associations of the American people can be held secret if they so desire.

This statement strongly suggests that petitioner did not regard the Fitzpatrick statement as constituting or including a claim of the privilege against self-incrimination, but as an assertion of rights under the First Amendment.

Under these circumstances, we contend that petitioner did not adequately inform the Committee that he was claiming the protection of the privilege.

Moreover, we feel bound to point out the probability that petitioner's ambiguous references to the Fifth Amendment (and those of the petitioner Emspak in No. 9), which he now contends constituted a claim of privilege, were phrased deliberately in such vague terms so as to enable petitioner (and Emspak) to obtain the benefit of the privilege without incurring the popular opprobrium which often attaches to its exercise. This suggestion is not based merely upon the obvious fact that it would have been extremely easy for petitioner to have informed the Committee that answers to its

questions might incriminate or endanger him. It is also based upon facts of record, and matters appropriate for judicial notice, which reveal that petitioner (and Fitzpatrick and Emspak) had compelling and immediate reasons to refrain from making any public statements from which it might be inferred, properly or not, that they were Communists or Communist sympathizers.

These facts are as follows: When petitioner (and Fitzpatrick) appeared before the House Committee in August 1949, there had already commenced the great debate within and without UE as to whether its leadership was Communist dominated, a debate which led to its expulsion on November 2, 1949, from the Congress of Industrial Organizations as a Communist dominated union.[4] Also, both petitioner and Fitzpatrick were candidates in an election about to be held in the Westinghouse East Pittsburgh Local 601 of UE (R. 103-104). This election was generally regarded as a struggle between Communist and anti-Communist factions in Local 601 (Pet. Exh. 2, 3, 4; R. 23-25).

In all likelihood, an unequivocal assertion of the privilege against self-incrimination by petitioner (and by Fitzpatrick and Emspak, the General Secretary of UE), in response to questions relating to Communist Party membership and activity, would have been regarded popularly as an admission of such matters. So regarded, it probably would have

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[4] 69 Monthly Labor Review (1949), pp. 640-644; New York Times, November 2 and 3, 1949.

been extremely damaging in the struggle then going on in Local 601 and throughout UE.

We concede, of course, that in a judicial proceeding no such adverse inference may or should be drawn from assertion of the privilege. However, it is a matter of common knowledge that drawing such an adverse inference is a widespread popular reaction to assertion of the privilege. We submit that petitioner (and Fitzpatrick and Emspak) must have anticipated that such would have been the general reaction of the rank-and-file membership of UE to any unequivocal claims of the privilege.

Under these circumstances, petitioner (and Fitzpatrick and Emspak) had compelling motives for burying any claim of the privilege in a form and mass of words which could not be seized upon by their union opponents. Clearly, they cannot now complain that neither the Committee nor the courts below failed to recognize their oblique references to the Fifth Amendment as an assertion of the privilege against self-incrimination.

B. *In any event, it was not error for the Court of Appeals to remand the case for a retrial on the question whether petitioner claimed the privilege.*

Although we think it is clear that the petitioner did not claim the privilege against self-incrimination, and although we also think it clear that the Court of Appeals had the power to so hold, and

probably should have done so, we think it is equally clear that it was not error for that court to remand the case for a new trial on the issue. 28 U.S.C. 2106; *Bryan* v. *United States,* 338 U.S. 552.

It is open on a new trial to determine whether petitioner's statement should be taken as a reference to all of Fitzpatrick's statements, as we have assumed in indicating the insufficiency even of the whole, or only to Fitzpatrick's original opening statement; or whether petitioner made reference only to Fitzpatrick's general criticism of the methods and motives of the Committee. As we have indicated, a canvass of these questions would not help petitioner. But we would not say that a Court of Appeals committed error in assigning to the District Court the task of making initial findings in that area.

II

The Question of Whether Petitioner Claimed the Privilege Against Self-incrimination Is Not Controlled by Principles of Res Judicata or Collateral Estoppel

It is admitted that whether the petitioner asserted the privilege against self-incrimination depends upon whether it was claimed in the statement of Fitzpatrick, which was adopted by petitioner. Since the court which tried Fitzpatrick for contempt held that he had claimed the privilege (*United States* v. *Fitzpatrick,* 96 F. Supp. 491 (D. D.C.)), petitioner urges that the question of whether petitioner claimed the privilege is now foreclosed against the Government and cannot be

litigated in this case. Accordingly, he urges that he should have been acquitted. This contention is likewise without merit.

It is clear that the principles of *res judicata* and collateral estoppel apply only in litigation between the parties in a criminal proceeding. See *United States* v. *Oppenheimer*, 242 U.S. 85, 87; *Frank* v. *Mangum*, 237 U.S. 309, 344; *Coffey* v. *United States*, 116 U.S. 436, 443.[5] None of the authorities cited by petitioner even suggests that a person who is not a party to a criminal proceeding which results in an acquittal can later urge *res judicata* or collateral estoppel against the United States, which could not appeal from the judgment of acquittal.

Since petitioner obviously would not have been foreclosed on this issue if Fitzpatrick had been convicted, petitioner seeks to avoid the rule of mutuality by asserting that the Government's obligation to establish in both cases the same fact, *i.e.*, that Fitzpatrick had not claimed the privilege, dispenses with the mutuality requirement. But even this Court's decision in *Bigelow* v. *Old Dominion Copper Mining & Smelting Co.*, 225 U.S. 111, 127-128, upon which petitioner relies heavily (Pet. Br. 46-47), recognizes that the exception to the rule of mutuality has been applied in "cases where the relation between the defendants in the two suits

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[5] None of these cases directly states this. But they all use language which *assumes* that *res judicata* principles are applicable only in favor of or against those who were parties to the earlier proceedings.

has been that of principal and agent, master and servant, or indemnitor and indemnitee". To the same effect is Section 451 of Freeman on *Judgments* (5th ed.), also relied upon by petitioner (Pet. Br. 46), while Section 99 of the Restatement of *Judgments* on its face is not concerned with the effect of judgments in criminal proceedings. See also the Scope Note preceding Chapter I of the *Restatement of Judgments.*

Moreover, petitioner's argument ignores the crucial fact that a determination with respect to Fitzpatrick's claim in Fitzpatrick's case is not necessarily the same as a determination with respect to Fitzpatrick's claim as adopted by petitioner. All of the circumstances of the Fitzpatrick hearing were relevant in determining whether Fitzpatrick had claimed the privilege—in a case where Fitzpatrick was on trial. And if there were some circumstance known to Fitzpatrick or to the Committee which threw light on Fitzpatrick's words or added to the Committee's understanding of them, they would be admissible in Fitzpatrick's case.

On the other hand, there would be a serious question whether anything about Fitzpatrick's hearing was relevant in petitioner's case except an objective reading of the record. Fitzpatrick's testimony as to what he meant to say would be relevant in his own defense. It is doubtful, however, that such testimony would be relevant in petitioner's defense.

There is, in addition, some doubt as to just what portions of Fitzpatrick's testimony petitioner was

referring to. When he was asked whether he was or had been a member of the Communist Party, he replied (R. 97):

> I would like to make a statement *along the lines* that Mr. Fitzpatrick made yesterday * * *. I feel that the political beliefs, opinions, and associations of the American people can be held secret if they so desire.
>
> Mr. Wood. And for those reasons you decline to answer the question?
>
> Mr. Quinn. I didn't say I was declining to answer the question. Before I do answer the question, I should like to say that I support the *position* taken by Brother Fitzpatrick yesterday.
>
> Mr. Wood. Did you hear his *statement* yesterday?
>
> Mr. Quinn. Yes, I did.
>
> Mr. Wood. Do you support it in its entirety?
>
> Mr. Quinn. In its entirety.
>
> Mr. Wood. Is there anything else you want to add to it?
>
> Mr. Quinn. No; I don't.
>
> Mr. Wood. Will you accept it as the expression of your views, then?
>
> Mr. Quinn. You may. * * *
>
> [Emphasis added.]

It is not clear from this dialogue, which was substantially all the colloquy on the point, whether

petitioner adopted only Fitzpatrick's formal, introductory statement, or whether he adopted all of Fitzpatrick's following comments and responses. Even assuming, for purposes of argument, that petitioner adopted every statement of Fitzpatrick which was at all pertinent to the latter's refusal to testify, different results in the cases might well be warranted by petitioner's independent characterization of his own position, that "I feel that the political beliefs, opinions, and associations of the American people can be held secret if they so desire."

There is, in short, no such simple identity of issue between Fitzpatrick's contempt liability and that of petitioner as would justify the application of *res judicata* or estoppel principles in the present case, even assuming that the normal principles of mutuality are inapplicable.

III

Petitioner's Refusal to Answer Whether He Was or Had Ever Been a Member of the Communist Party Was With Knowledge That the Committee Was Requiring Him to Answer

Petitioner urges that he should have been acquitted because he "was never specifically directed by the committee to answer the question" (Pet. Br. 48-49), and adopts the arguments to that effect in the brief of the petitioner in *Emspak* v. *United States,* No. 9. In the Government's brief in *Emspak,* pp. 39-43, we have set forth our view, which is that of the court below, that a witness before a Congressional committee who raises an objection to a question must in some manner be clearly ad-

vised that his objection has been rejected and that he is being required to answer, before his refusal can constitute a violation of 2 U.S.C. 192. We also contend that no rigid form of words need be used to apprise the witness of this fact. Accordingly, we request the Court to consider that portion of our brief in *Emspak* as if it were set out here.

A. *Petitioner understood that the Committee had rejected his objections to its question, and was requiring him to answer.*

After petitioner indicated his adoption of the views expressed by Fitzpatrick, he was asked by the Committee chairman whether for that reason he declined to answer. Petitioner replied that he was not declining to answer and referred again to his support of Fitzpatrick's views. The Chairman then said (R. 98):

> Having made that statement and subscribed to the sentiments expressed by the witness yesterday to whom you referred, will you now answer the question whether you are now or have even been a member of the Communist Party?
>
> Mr. Quinn. I hold that the Constitution holds sacred the rights of people——
>
> Mr. Wood. You have stated your position. Having enunciated your sentiments and your position, will you now answer the question whether you now are or ever have been a member of the Communist Party, or do you decline to answer?

Mr. Quinn. I decline to discuss with the committee questions of that nature.

Mr. Wood. Proceed, Mr. Tavenner.

Mr. Tavenner. I believe in the light of that answer it is not necessary to ask you any further questions relating to those matters * * *.

The colloquy shows, first, that the Committee clearly indicated to the petitioner that it did not regard his reference to Fitzpatrick's statement as a sufficient justification for refusal to answer. The words used here, "having made that statement * * *, will you now answer the question * * *?" clearly conveyed to the witness that the Committee was overruling his objection and directing him to answer notwithstanding his objection.

Moreover, the colloquy shows that the petitioner clearly understood that the Committee had rejected his views and was nonetheless remaining adamant in his refusal to answer. For the Chairman posed the alternative to him—"You have stated your position. * * * will you now answer the question * * * *or do you decline to answer*" [emphasis added]. Petitioner replied: "I decline to discuss with the committee questions of that nature. (R. 98)."

Unless the law is to be that a specific direction to answer in *haec verba* is required, and even petitioner does not seriously press this view, we think it is clear that the record establishes that the petitioner's refusal to answer was with knowledge that the Committee was requiring him to do so.

B. *In any event, it was not error for the Court of Appeals to direct a retrial on the question of whether petitioner understood that he was required to answer.*

The Court of Appeals did not decide whether the present record showed that petitioner was aware that he was being required to answer in spite of his objections. It reversed for a new trial on the question whether petitioner had claimed the privilege against self-incrimination and observed, in doing so, that the issue of whether petitioner's refusal to answer was deliberate and intentional would be open on retrial (R. 172). In view of the remand of the case on the claim of privilege issue, the remand on the "refusal" issue as well was within the power of the court below.

IV

Petitioner Was Not Entitled to a Dismissal of the Indictment Because of the Presence of Government Employees on the Grand Jury, nor Did His Proffer Entitle Him to a Hearing on that Issue

The petitioner claims that his conviction should be reversed because his motion, challenging the indictment because of the presence of government employees on the grand jury, was improperly denied. The motion sought either (a) the immediate dismissal of the indictment, on the assumption that the allegations of the motion sufficiently showed the bias of government employees serving on the grand jury, or (b) a hearing to give the petitioner an opportunity to demonstrate this bias. The basic

contention, on either aspect of the motion, is that government employees could not act as fair and impartial grand jurors because of alleged pressures put on government employees, particularly by the President's Loyalty Program, to express antagonism to Communism and Communists.

We submit that this contention is unsound. As we shall show below, the principle followed by most of the courts that have dealt with the problem is that bias in a grand juror, in the absence of a controlling statute, does not invalidate an indictment except where the showing of bias in particular grand jurors is specific, individual, and strong. And, by this test, it is plain that the allegations in the present case did not suffice to require a dismissal of the indictment or a hearing on the issue of bias.

A. *The Standards of Bias.*

Most of the courts that have had occasion to deal with the problem have held that, absent a statute, bias on the part of a grand jury does not invalidate its indictment. See e.g. *United States* v. *Rintelen*, 235 Fed. 787, 789 (S.D. N.Y.); *United States* v. *Smyth*, 104 F. Supp. 283, 301 (N. D. Calif.), and cases collected in support of this proposition in Annotation, *Prejudice of Member of Grand Jury Against Defendant as Ground of Attack on Indictment*, 88 A.L.R. 899, and 24 Am. Juris., Grand Jury, § 10. Many courts have sustained this view even on records which have made the implication of bias fairly strong. See e.g.

United States v. *Williams*, Fed. Cas. No. 16,716 (C.C.D. Minn.) (prosecutor who tried case had been a member of the grand jury); *Coblentz* v. *Maryland*, 164 Md. 558, 166 Atl. 45 (indictment against defaulting bank official returned by grand jury some of whose members had lost money as a result of default); *State* v. *Easter*, 30 Ohio St. 542 (murder indictment returned by grand jury which included nephew of deceased); *Rice* v. *State*, 204 Ark. 236, 161 S.W. 2d 401 (indictment returned by grand jury which included unsuccessful political opponent of accused); see also *United States* v. *Caldwell*, 8 Alaska 117, 121-122, and *Collins* v. *State*, 3 Ala. App. 64, 67, 58 So. 80.

New York, which has a statutory provision that permits challenge of a grand juror if it appears "That a state of mind exists on his part in reference to the case or to either party, which satisfies the court, in the exercise of a sound discretion that he cannot act impartially and without prejudice to the substantial rights of the party challenging" (New York Code of Criminal Procedure, § 239(6); see also § 376(2)), has interpreted the statute to mean that there must be a showing of actual bias of an individual juror, as contrasted with implied bias, in order to disqualify. *People* v. *Prior*, 268 App. Div. 717, 54 N.Y.S. 2d 150, 153, affirmed, 294 N.Y. 405, 410-411, 63 N.E. 2d 8, 10. And California has, by statute, expressly withdrawn an earlier statutory right to challenge a grand juror or to attack an indictment on the

ground that grand jurors were prejudiced. *People* v. *Kempley,* 205 Cal. 441, 446-448, 271 Pac. 478, 480-481.

There are, however, cases in which the bias was particularly clear, and which have, in consequence, invalidated the indictments. See, e.g., *State ex rel. Reichert* v. *Youngblood,* 73 N.E. 2d 174 (Ind.), (grand juror reported to have boasted "I know how I got on the grand jury. We are going to get a Mayor * * *.")[6] The picture, in short, is that bias of grand jurors is not a ground for invalidating an indictment, except in cases as clear as *Youngblood, supra.* This picture clearly reflects the view, often expressed, that an "indictment is, after all, no more than an accusation." See, e.g., *Remington* v. *United States,* 191 F. 2d 246, 252 (C.A. 2), certiorari denied, 343 U.S. 907.

In addition, it should be pointed out that even when it is recognized that some kinds of bias may disqualify a grand jury, it is still required that the showing be made of that bias in specific terms,

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[6] The *Youngblood* court, at 73 N.E. 2d 179, cited with approval the following quotation:

"The general rule is that neither the bias nor prejudice of a grand juror, nor his interest in a prosecution (other than a direct pecuniary interest), nor the fact that he has formed, or expressed an opinion, will so disqualify him as to render invalid indictments returned by the grand jury. 20 Cyc. 1300; United States v. Belvin, C.C., 46 F. 381; Commonwealth v. Woodward, 157 Mass. 516, 32 N.E. 939, 34 Am. St. 302; Rolland v. Com., 82 Pa. 306, 22 Am. Rep. 758. But we know of no authority which goes so far as to hold that this would be true where jurors had determined, through malice or bribery, to violate their oaths. It is the difference between honest error, to which all men are subject, and the wilful corruption which distinguishes the malefactor."

rather than in the form of a mere general allegation of prejudice. See e.g., *Cleveland* v. *United States*, 146 F. 2d 730, 732-733 (C.A. 10), affirmed, 329 U.S. 14, where it was alleged that the indictment against the defendant for statutory rape resulted from a fractional dispute in the Mormon Church, and "that the foreman of the grand jury was a prominent and dominating figure in the high priesthood quorums of the church; that, upon information and belief, a large majority of the grand jurors, if not all of them, were likewise influential members of the church; and that the indictment was returned in a spirit of animosity and enmity toward the defendant." The court rejected this showing as insufficient, stating (146 F. 2d at 732-733):

> * * * Except the ex parte affidavit attached to the motion, which contained many allegations predicated upon information and belief, there was no showing that the foreman or any other member of the grand jury belonged to any particular religious sect, or that he bore any animosity, enmity, or prejudice against the defendant. Neither was there any showing that due to prejudice or other like attitude toward the defendant, the foreman or any other member exerted or sought to exert influence with members of the body in bringing about the return of the indictment. Assuming, without so deciding, that the indictments were subject to attack on the ground indicated, the motions and ex parte affidavits,

alone and without more, were not enough to warrant the quashing of them.

It would seem, therefore, that there is considerable support for the view (a) that only circumstances indicating strong actual and personal bias normally will be recognized as invalidating an indictment, and (b) that those circumstances must themselves be specifically set out in any attempt to challenge the indictment.

This result is consistent with the history and purpose of the use of grand juries. Historically, dating at least from the time of our Constitution, it is clear that grand juries were not expected to be unprejudiced. They were in part serving as conduits to report the common knowledge of the community to the courts. Orfield, *Criminal Procedure from Arrest to Appeal* (1947), 144-145. The fact that they might have formed a prejudgment as to the truth of an accusation was not relevant. *United States* v. *White,* Fed. Cas. No. 16,679 (C.C. D.C.). Nor was the fact that they might even have prejudices against a possible accused unrelated to the circumstances of the particular case. Cf. Fee, D.J., in *United States* v. *Smyth,* 104 F. Supp. 283, 301 (N.D. Col.), and A. N. Hand, D.J., in *United States* v. *Rintelen,* 235 Fed. 787, 789 (S.D. N.Y.). See also *United States* v. *Fujimoto,* 102 F. Supp. 890, 896 (D. Hawaii). They took oaths not to allow prejudices to influence their returns, and this was apparently regarded as a sufficient safeguard.

Although the growth in size of the communities in which grand juries act means that they are far less likely to have prior personal information about the accusations which they return, this same growth also means that grand jurors are more likely to have biases with respect to particular classes of persons or particular types of crimes, which are not tempered by personal knowledge of the accused. A grand jury in a modern urban community will, in the course of its service, have brought before it a large gamut of crimes and persons. It would be a serious impairment of the work of such juries if defendants were free to invalidate indictments on showing, in general terms, that there were community prejudices of one sort or another probably operating on the grand jury to their disadvantage, or to be free to delay the process of a criminal case by demanding a hearing in order to rummage among the thoughts of individual grand jurors to discover such possible prejudices. A "trial of the grand jury", particularly on the basis of unsubstantiated allegations, would be a serious obstacle to the process of disposing expediously of criminal charges—on their merits. See Swan, C.J., in *Remington* v. *United States*, 191 F. 2d 246, 252 (C.A. 2), certiorari denied, 343 U.S. 907. And it would be a serious addition to the disadvantages incident to citizen service on grand juries. It follows, therefore, that the practical operation of the grand jury system requires, what we have suggested that the cases hold, that a show-

ing of grand jury bias must be clear and strong; and that, absent such a showing, a foraging operation to discover such bias cannot be permitted.[7]

There is only one group of cases in which this Court has considered squarely the composition of grand juries. In these cases, the Court has insisted that grand jury panels be broadly representative of the community, and has struck down indictments returned by grand juries drawn from panels from which particular groups—Mexicans, Negroes, women, and wage earners—had been deliberately excluded. E.g. *Hernandez* v. *Texas*, 347 U.S. 475; *Ballard* v. *United States*, 329 U.S. 187; *Thiel* v. *Southern Pacific Co.*, 328 U.S. 217. In doing so, the Court has indicated that an accused is entitled to indictment by "a fair and impartial grand jury" (*Cassell* v. *Texas*, 339 U.S. 282), which suggests that a grand jury made up by a systematically discriminatory process is regarded by this Court as not able to be fair and impartial in considering matters which involve the

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[7] This Court has never said what kinds of bias, if any, would disqualify a grand jury. In *Hale* v. *Henkel*, 201 U.S. 43, 59, the Court said that it is the function of a grand jury "to stand between the prosecutor and the accused." See also *Ex parte Bain*, 121 U.S. 1, 10-11. This means, of course, that a grand jury which was merely the tool of the prosecution would not be a proper grand jury; but it sheds very little light on any criteria by which to judge whether a particular jury is, in fact, a tool of the prosecutoin. It would seem, however, that not every circumstance which might indicate bias in the jury would indicate that the jury was so pliant that it would do whatever it was told.

excluded group.[8] The petitioner urges this point as a basis for his argument that the possibilities of bias in government employees serving on a grand jury, dealing with a person cited for contempt of the House Committee on Un-American Activities, are quite as great as the possibilities of bias in a grand jury, discriminatorily selected, against members of the group which is excluded.

But, even assuming that the arbitrary exclusion holdings ultimately reflect the view that the excluded group may be subjected to the improper biases of grand jurors drawn solely from the excluding group, it is clear that this is not the only

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[8] Cf. *Strauder* v. *West Virginia*, 100 U. S. 303, 309, which dealt with petit jury panels from which Negroes had been deliberately excluded:

"* * * * It is well known that prejudices often exist against particular classes in the community, which sway the judgment of jurors, and which, therefore, operate in some cases to deny to persons of those classes the full enjoyment of that protection which others enjoy. Prejudice in a local community is held to be a reason for a change of venue. The framers of the constitutional amendment must have known full well the existence of such prejudice and its likelihood to continue against the manumitted slaves and their race, and that knowledge was doubtless a motive that led to the amendment. By their manumission and citizenship the colored race became entitled to the equal protection of the laws of the States in which they resided; and the apprehension that through prejudice they might be denied that equal protection, that is, that there might be discrimination against them, was the inducement to bestow upon the national government the power to enforce the provision that no State should deny to them the equal protection of the laws. Without the apprehended existence of prejudice that portion of the amendment would have been unnecessary, and it might have been left to the States to extend equality of protection."

basis for those decisions; and, indeed, those holdings implicitly refute the view that a *possibility* of grand jury bias is enough to disqualify the jury. Those cases turn principally on the view that the grand juries chosen are unrepresentative of the community, and therefore not proper grand juries, a view which clearly reflects the history of grand jury proceedings to which we referred above. It is plain that it is not merely general prejudice against the accused's class that is involved, because the remedy of the Court has been to require the selection of grand jury panels without the arbitrary exclusion. Such a remedy does not provide for the exclusion of those who might still be prejudiced; it merely insures the presence, at random, of the previously excluded group on jury panels, although not necessarily on particular grand juries. Any serious prejudice against members of the previously excluded group is not likely to be erased or rendered ineffective by the inclusion of members of that group on a jury panel; and, presumably, even the inclusion of a member on a particular grand jury would not prevent other grand jurors from voting in accordance with their prejudices. It seems, therefore, that mere general prejudice is not being cured, but rather unfair representation. The Court has implicitly recognized in those cases that the various general community prejudices are not a basis for attack on the grand jury, so long as there is a fair chance that grand juries will be representative of the entire community. Cf. *Ruthenberg* v. *United States*, 245 U. S. 480 (fact that no Social-

ists on grand jury held not a basis for challenging indictment).

B. *By the Standards Properly Applicable in the Disqualification of Grand Jurors for Bias, the Petitioner's Allegations Are Insufficient.*

1. *The allegations on the present record.*

By the standards we have set out above, there is no basis for attack on the present indictment. The petitioner, in his motion to dismiss, set out a collection of circumstances which show, he says, why members of the grand jury indicting him could reasonably feel that it would be dangerous for them to vote against indictment. These allegations do not show, do not even purport to show, that any particular juror felt this way, but, at best, urge only that some basis existed for supposing that some government employees, if called as grand jurors, might have felt afraid. To emphasize this, we set the allegations out particularly, as follows:

> 1. All government employees, at the time of petitioner's indictment, were subject to Executive Order 9835, which included as one of its criteria for continued government employment the absence of any "sympathetic association" with the Communist Party or other activities alleged to be "subversive". (R. 16.)
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> 2. The indictment in this case arose out of an investigation of the House Committee on

Un-American Activities (R. 16), a Committee which "has given much time and consideration to the investigation of alleged Communist influence among federal government employees and has announced * * * that the Committee files have been used by the investigative agencies of the federal government to determine the loyalty of federal government employees" (R. 36).

3. The House Committee on Un-American Activities made threats against the Attorney General of the United States if indictments were not returned against a number of witnesses who were allegedly in contempt of the committee (R. 16, and 93 Cong. Rec. 3815.[9]

4. Mr. Justice Jackson, in a dissent in *Frazier* v. *United States,* 335 U. S. 497, 515, joined in by Justices Frankfurter, Douglas, and Murphy, stated that "A government employee cannot today [December 1948] be disinterested or unconcerned about his appearance of faithful and enthusiastic support for government departments whose prestige and record is, somewhat, if only a little, at stake in every * * * prosecution".

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[9] The reference to the Congressional Record plainly does not support this charge, but shows only that a Congressman asked on the floor of the House whether the Attorney General could be impeached if he failed to do his duty in seeking indictments promptly. 93 Cong. Rec. 3815.

5. The Internal Security Act of 1950 placed sanctions upon "sympathetic association" by government employees with alleged Communist activities.

6. Following the first trial of the perjury prosecution against Alger Hiss, members of Congress introduced a resolution demanding the investigation of Justice Kaufman before whom the case was tried; and "one of the jurors who had refused to vote for conviction against Alger Hiss was required to appeal to law enforcement agencies for protection from those individuals who were harassing him because of that vote" (R. 37).

7. Following an order of the Court of Appeals for the Ninth Circuit granting bail to Harry Bridges, who was accused of falsely denying under oath a past Communist affiliation, United States Senator Langer on the floor of Congress demanded an investigation of the judges involved (R. 37). Cf. *Bridges* v. *United States,* 346 U. S. 209.

8. A "substantial part of the press freely voiced their opinions for public consumption that employees of the federal government should in fact be subjected to the most rigorous and unlimited kind of investigation and interrogation as to their state of mind in respect to their political beliefs, opinion and asosciations, no matter how far removed, and that if there was any question whatsoever or any doubt about what they considered to be 'loyalty', the

culprits should be summarily dismissed from their employment and in fact blacklisted" (R. 38).[10]

9. At the time that the grand jury in the instant case was considering whether to return indictments against the petitioner, and almost a month before the indictments were actually returned, the United States Civil Service Commission reported publicly that 280 government employees had been dismissed as security risks under the Federal Loyalty Program; that 13,202 employees had been the subject of full and complete investigation by the Federal Bureau of Investigation and other agencies; that 1,593 federal employees had resigned while under F. B. I. investigation, and 1,171 federal employees had left their government jobs before the Loyalty Boards had completed their hearings (R. 40).

The petitioner's motion was then supplemented by newspaper views of nine persons, mostly columnists, which appeared principally in 1947,[11]

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[10] We have not attempted to test this proposition in detail, but it seems plain that, as broadly stated, it is both untrue and irrelevant. The press of major relevance to the present case would seem to be the Washington press. We assume that judicial notice can be taken of the fact that it did not take so extreme a position as the petitioner states, and, in fact, that some of that press took exactly the opposite position, as the appendices to petitioner's motion show.

[11] Six of the nine articles appeared in 1947; one in 1948; and two in 1949.

some of which were to the effect that the government loyalty program was creating doubts and fears among government employees (R. 45-63).

It was and is argued that this showing, particularly under the recent ruling of this Court in *Dennis* v. *United States,* 339 U. S. 162, required either a dismissal of the indictment, or a hearing on the issue of bias. The District Court denied both.

2. *The showing thus made was insufficient to require dismissal of the indictment.*

a. The weakness of the showing made by petitioner may be made most clear by pointing out what it does not establish. It does not establish that any particular jurors had any fear that a vote against returning an indictment, made in honest conviction on the basis of the evidence presented, would in any way be noted by any government investigative agency or by those responsible for the enforcement of the Federal Loyalty Program. It does not establish that any government investigative agency or those responsible for the enforcement of the Federal Loyalty Program had ever taken account of such an honest vote. It does not establish that any substantial number of federal employees would have feared that any agency would take cognizance of such an honest vote, since it is perfectly apparent that, even if there were a showing that there were some employees who feared reprisals for their honesty, this would not tend to show that most employees felt that way

or that the particular employees on this grand jury felt that way. Compare *United States* v. *Fields,* 6 F. R. D. 203, 205 (D.D.C.).

These shortcomings in petitioner's showing are particularly important because his case depends on a showing that substantially all of the government employees on the grand jury were probably thus affected by fear. The record shows that 20 grand jurors concurred in voting to return the indictment, and that 10 of these were government employees and 2 more were wives of government employees. (R. 161.) Rule 6 of the Federal Rules of Criminal Procedure requires a concurrence of 12 grand jurors to return an indictment, and further provides that "An indictment shall not be dismissed on the ground that one or more members of the grand jury were not legally qualified if it appears * * * that 12 or more jurors, after deducting the number not legally qualified, concurred in finding the indictment." It follows, therefore, that if four of the government employees—and wives—voted for the indictment, without fear of reprisals, it was valid. This means that petitioner must show not only that there was basis for supposing that some government employees would fear an honest vote, because of the Loyalty Program, but that substantially all of that group, presumably selected at random, would do so. His showing plainly does not establish this; and when it is remembered further that his showing depends on an even more unlikely fear on the part of wives of government employees, it is weakened even further.

Beyond these deficiencies in his allegations which relate to the impact of the Federal Loyalty Program, and government investigative activity related to that program, it is clear that the petitioner's showing is one which would have quite as much impact on those who were not government employees as it would on those who were. It is fair to say that Americans in general do not like Communists or communism, and may anticipate that their neighbors will censure them if they express sympathetic support for either Communists or communism. And if the Loyalty Program does not impose a special burden on federal employees in this respect, and petitioner has not shown that it does, there is no basis for disqualifying a representative District of Columbia grand jury.

But, in any event, it is a far cry from saying that Americans do not like Communists to saying that no one alleged to be a Communist can count on a fair consideration of his case. Petitioner has not demonstrated, and he cannot demonstrate, that there is not left in grand jury panels, whether of government employees or not, the simple fortitude to return only those indictments that are called for by the evidence, in accordance with the specific instructions given to the grand jury, with the oaths taken by the grand jurors, and with the whole concept of fairness in the American political tradition. The petitioner's argument that the jurors would be intimidated into returning a baseless accusation is very little different from a contention that one accused of a particularly vicious murder would be

prejudiced because most people do not like people who commit vicious murders. Both arguments are plainly unsound.

b. The showing of possible bias on the present record is no greater than the showing made in *Dennis* v. *United States,* 339 U. S. 162, and rejected by the Court as insufficient. In the *Dennis* case, this Court rejected an attempt made by Dennis to show that government employees were disqualified by bias from serving as *petit* jurors in a case involving an alleged contempt of the Committee on Un-American Activities. It is submitted that, by the standards of the *Dennis* case, the petitioner's showing is insufficient.

In *Dennis,* the objection to the presence on the jury of government employees was made, first, before the trial, by a motion for transfer from the District of Columbia (see *Dennis* record, O.T. 1949, No. 14, p. 27). An affidavit filed in support of the motion for transfer pointed out that Dennis was general secretary of the Communist Party of the United States, as was well known; alleged the existence of the President's Loyalty Order; and urged the serious consequences of a finding of disloyalty under this Order, even in a case where the finding of disloyalty might be upset. It was emphasized that the charges against Dennis had grown out of an investigation of the House Committee on Un-American Activities, a committee whose members had demanded on the floor of the House of Representatives that there be prosecution, conviction, and imposition of the maximum punishment in the case,

under pain of investigation and punishment for those who interfered (*Dennis,* R. 29). It was stated, indeed, that:

> It is well known that the House Committee on Un-American Activities employs agents to observe and spy upon the activities of Government employees and their associates in order to secure evidence as to whether or not such employees are "sympathetic" to individuals or organizations which the Committee * * * associates with Communism or Communists. The Committee has made a public announcement of this policy and went to the point of stating that it would have its agents at a public meeting * * * addressed by the former Vice-President * * * Henry A. Wallace, in order to take the names of and to identify those who were present * * *.

Finally, the motion concluded with reference to the views of the publicists, Thomas Stokes, Harold Ickes, and I. F. Stone, to the effect that the activities of the Committee were outrageous and were calculated to cow the independence of government employees (*Dennis,* R. 29-32).

Later, at the close of the *voir dire* examination, Dennis challenged for cause all government employees on the basis of the President's Loyalty Order (*Dennis,* R. 64-65). The matter was advanced again on a defense motion for new trial (*Dennis,* R. 348-349, 369) but was overruled (*Dennis,* R. 353). All of the Dennis motions were denied.

In the proceedings in this Court, Dennis outlined further activities of the Committee on Un-American Activities indicating the breadth of its concern with conduct it disapproved, and setting out the views of judges, expressed in opinions, and of publicists, commenting on the restraint on free expression alleged to result from these activities. In addition, the petitioner renewed his contention that Executive Order 9835 completely impaired any impartiality on the part of a government employee.

Nonetheless, in the face of this showing, Mr. Justice Minton for the Court stated that the showing was insufficient, that (339 U.S. at 168):

> * * * [There was no] evidence which would indicate that investigatory agencies of the Government had recognized in the past or would take cognizance in the future of a vote of acquittal * * *. Nor was there evidence with respect to the existence of a climate of opinion among government employees that they would jeopardize their tenure or provoke investigation by such a verdict.

And later, the Court also stated (at p. 172):

> * * * Vague conjecture does not convince that Government employees are so intimidated that they cringe before their Government in fear of investigation and loss of employment if they do their duty as jurors * * *. There is no disclosure in this record that these jurors did not bring to bear, as is particularly the custom when personal liberty hinges on the determina-

> tion, the sense of responsibility and the individual integrity by which men judge men.

Thus, it would seem that, in the *Dennis* case, the Court was insisting on a specific demonstration of bias and subjection to fear before it would disqualify a petit juror. We submit that, by the standard there applied, the showing here was clearly insufficient, and, in fact, did no more than assert, as Judge Clark observed in the companion *Emspak* case, the "miasma of fear" which this Court rejected in *Dennis*.

Nothing further that was shown here requires the conclusion that grand jurors who were government employees would fail to live up to their oaths. The Loyalty Order itself, no more here than in *Dennis*, requires the conclusion that government employees were so lacking in courage that they could not determine that there was no probable cause for the indictment of petitioner, if they regarded the evidence as insufficient.

Moreover, the emphasis on the nature and activities of the Committee on U -American Activities is the same here as in *Dennis*. The fact that members of the Committee might have been imperious with respect to the Attorney General, if it was not a basis for disqualifying the *Dennis* petit jury, is not a basis for disqualifying the grand jury which indicted petitioner (even if it is assumed that the jurors were aware of the incident). The assessment in the *Dennis* dissents of the Washington atmosphere, the views of the press, the Hiss and Bridges

incidents, all were as significant to one situation as to the other. Yet, in *Dennis*, they were found not enough. It would seem meaningless to point out that a number of persons had been investigated or discharged under the federal loyalty program, so long as it appears that the number of discharges was relatively small and so long as it does not appear that there is any reason for anyone to believe that the discharges had been based on the honest performance of grand or petit jury duty. We urge again that the data set out in this case is, in substance, a mere repetition—though perhaps more voluminous—of what has already been rejected in *Dennis*.

The standards of bias applied in *Dennis*, moreover, were for the purpose of testing a petit jury in whose hands it lay to make a final determination of guilt. It would seem clear that the standards applicable to a grand jury, a body whose final act is, as has been said, "no more than an accusation" (*cf. Remington* v. *United States*, 191 F. 2d 246, 252, certiorari denied, 343 U. S. 907), need not be as strict as those applicable to a petit jury. It follows, *a fortiori*, that if petitioner's showing would be insufficient under *Dennis*, it is insufficient here. There is no ground for dismissal of the indictment.

3. *A hearing was also properly denied.*

It was incumbent upon the petitioner to show either that the government employees who served as grand jurors in this case were afraid that an honest vote against his indictment would be regarded as evidence of disloyalty, or that there was such a

probability of fear that all government employees should be disqualified. As we have pointed out, petitioner's showing did not warrant dismissal of the indictment. But petitioner also asked for a hearing. The justification and objectives of the hearing demanded by petitioner on this issue are stated in the following portion of an affidavit of his counsel, Mr. Scribner:

> Under the applicable law the defendant must be given an opportunity to demonstrate and inquire into the effect of the President's Loyalty Order upon government employees in general and those in the Grand Jury in particular. The defendant must be given an opportunity to demonstrate that the investigations under the President's Loyalty Order inquire into conduct of government employees including their activities as Grand Jurors or the activities of spouses of Grand Jurors in respect to issues like those involved in the present indictments. I respectfully call to the attention of the Court the threats of the House Committee on Un-American Activities against the Attorney General if indictment in contempt cases were not returned * * *. [R. 16-17.]

The first sentence of this statement demands a hearing to inquire into the impact "of the President's Loyalty Order upon government employees in general and those in the Grand Jury in particular." Viewed alone, this request calls for a

cases seems to be relevant to the present situation. For, even if it be assumed that the return of a grand jury whose bias against the defendant is in fact clearly and specifically shown must be invalidated, regardless of the strength of the *prima facie* case made, it does not follow that an indictment should be set aside where the allegations of bias are conclusionary and general, and where it also appears that the *prima facie* case made could only have resulted in indictment.

V

The Committee on Un-American Activities Was Empowered to Require Petitioner to Answer the Question Involved Here

Petitioner contends that "House Resolution 5 as construed and applied herein abridged petitioner's freedom of speech, press and assembly in violation of the First Amendment" (Pet. Br. 17). Since petitioner adopts by reference all of the contentions made in Emspak's brief in *Emspak* v. *United States,* No. 67 last Term, No. 9 this Term, we assume that he means to attack the validity of the Resolution on all the grounds set forth by Emspak. In the Government's brief in *Emspak* v. *United States,* we have set forth our contention that the Resolution both on its face and as applied in that case is constitutional. We request the Court to consider those arguments as if they were fully set out here.

As applied to the petitioner in this case, those arguments may be summarized as follows: Each

House of Congress may empower its Committees to obtain information, by compulsion when necessary, to assist the Congress in performing its legislative functions. *McGrain* v. *Daugherty*, 273 U. S. 135, 171-175; *Sinclair* v. *United States*, 279 U. S. 263; *United States* v. *Norris*, 300 U. S. 564, 573. These legislative powers of investigation include the power to scrutinize the administration and effectiveness of existing Federal legislation and the power to inquire into the need for new or supplementary legislation. They cannot be limited to the precise area in which it might be assumed in advance of inquiry that Congress could validly legislate, for not only the need, but also the form and extent, and even the constitutional basis for legislation, often can be ascertained only by investigation of the facts.

The Congressional power to investigate clearly reaches to Communist activity in the United States. This Court has recognized that, prior to the adoption of House Resolution No. 5 in 1949, the Congress had ample grounds not merely to investigate but to legislate with respect to the Communist Party and its activities. See *Carlson* v. *Landon*, 342 U. S. 524; *Harisiades* v. *Shaughnessy*, 342 U. S. 580; *Adler* v. *Board of Education*, 342 U. S. 485. *American Communications Association* v. *Douds*, 339 U. S. 382; *Dennis* v. *United States*, 341 U. S. 494.

The intended scope of the Resolution is clear both on its face and from its history. It derives from a 1934 resolution of the House of Representatives

creating the so-called McCormack committee to investigate "(1) the extent, character, and objects of Nazi propaganda activities in the United States, (2)" etc.[12] The work of this committee (H. Rep. 153, 74th Cong. 1st Sess. (1935)) led to the Foreign Agents Registration Act of 1938 (52 Stat. 631, 22 U.S.C. 611 *et seq.*). It is clear that it was the desire of the House of Representatives to investigate both Communist and Nazi propaganda that led to the passage in 1938 of a resolution[13] creating a committee to investigate "the extent, character, and objects of un-American propaganda activities in the United States" (and continuing verbatim with the remainder of the language of the Resolution involved in the instant case). The obvious purpose in using the phrase "*un-American* propaganda" was to reach the political extremism of both Nazism and Communism.[14]

In our brief in *Emspak* v. *United States,* we have made an extended analysis of the words and phrases

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[12] The operative words of the 1934 resolution were

> for the purpose of conducting an investigation of (1) the extent, character, and objects of Nazi propaganda activities in the United States, (2) the diffusion within the United States of subversive propaganda that is instigated from foreign countries and attacks the principle of the form of government as guaranteed by our Constitution, and (3) all other questions in relation thereto that would aid Congress in any necessary remedial legislation. [78 Cong. Rec. 4934.]

[13] H. Res. 282, 75th Cong., 3d Sess.

[14] See Ogden, *The Dies Committee* (1943), pp. 38-46; Carr, *The House Committee on Un-American Activities* (1952), pp. 13-17.

"un-American," "subversive propaganda," and "propaganda activities" (Govt. Br. in *Emspak* v. *United States*, 86-95). Here, we reiterate only that in 1938 and since, and with ample justification in recent history, Congress has been concerned not with un-American or subversive propaganda in the abstract but with propaganda in the practical sense of the inducements used in the recruitment of followers in this country for the different brands of political extremism. The heart of the Congressional concern was its conclusion that the Nazi and Communist propaganda activities with which it was primarily concerned were organized and directed by foreign governments to serve the objectives of those governments. From the earliest times, governments have been obliged to take into account and to regulate such activities of other governments, and the power of Congress to do so is beyond dispute

Clearly, therefore, Congress, by Resolution 5 and its predecessors, has intended that the Committee should investigate "the extent, character, and objects" of Communist propaganda activities in the United States. The Committee has done so. And the action of the House of Representatives (and of the Congress) in repeatedly extending the Committee's existence and in enacting legislation on the basis of the Committee's hearings and reports constitutes an overwhelming ratification of the Committee's view that it was authorized to inquire into the propaganda activities of Communists and their affiliates. This ratification does not consist of

counsel at the opening of the hearing in which petitioner appeared as a witness, as follows (in part):[17]

> Mr. TAVENNER: Mr. Chairman, the purpose of this hearing is to inquire into the question of Communist affiliation or association of certain members of Local 601 of the United Electrical, Radio and Machine Workers of America, CIO, which is engaged in work at industrial plants important to the national defense.
>
> The advisability of recommending legislation providing for security standards, and the advisability of tightening present security requirements in industrial plants working on certain Government contracts, was considered by the committee in both its open and executive sessions on June 6, 1949, as a result of the testimony of Leona and Joseph Franey and Loren G. Haas.

Specifically, petitioner asserts that the Committee's authority to investigate Un-American and subversive propaganda "cannot be construed to authorize an investigation into the need to protect defense plants from espionage or sabotage" (Pet. Br. 21). The contention is without merit.

To begin with, petitioner does not deny the power of Congress to investigate Communist infiltration or control of labor unions, as he could not in view of *American Communications Association* v. *Douds, supra.* Indeed, he concedes that the sub-

[17] The full statement of the Committee's counsel is set out *supra*, pp. 7-8.

ject falls "within the long established and well recognized jurisdiction of another House committee" (Pet. Br. 24)—presumably meaning the House Committee on Education and Labor (Pet. Br. 21). It is clear, however, that overlapping jurisdiction of Congressional committees is of concern only to the Congress and cannot be resolved in a lawsuit such as this.

Thus, petitioner is forced to his principal argument that the Committee can investigate propaganda and propaganda activities, *i. e.*, "the dissemination of ideas of a certain kind," but may not investigate "the acts which might be undertaken by those who accept and believe in such propaganda" (Pet. Br. 24). This contention flies in the face of the express authorization in the Resolution to investigate "the extent, character, and objects" of propaganda activities.

Even assuming that the House of Representatives intended only to authorize the Committee to investigate "the extent, character, and objects" of Communist propaganda and "all other questions in relation thereto that would aid Congress in any necessary remedial legislation," and not Communist activities generally, the line of demarcation urged by petitioner is meaningless. While ideas are weapons in war for men's minds, and words "may have all the effect of force" (*Schenck* v. *United States*, 249 U. S. 47, 52), the House of Representatives presumably was not concerned with "the dissemination of ideas of a certain kind" in the abstract. Rather, it was concerned with "the

extent, character, and objects" of Communist propaganda in this country.

We may assume that by the time of the Committee hearing involved here, in 1949, the Committee had little doubt as to the objects of Communist propaganda, *i. e.*, the recruitment of followers who would support the policies of the Soviet Union not only in the political sphere but through political strikes, espionage, and sabotage. But the Committee had a continuing duty to inform itself and the Congress as to where in our society such propaganda or recruiting activities were being carried on, their extent, by whom and by what methods, and for what immediate purposes. Such information is the only basis upon which Congress can determine whether existing legislation is adequate, whether additional legislation is required, and if so, along what lines.

In this context of the Committee's power under the Resolution, the statement of its counsel that the Committee's immediate concern was the "Communist affiliation or association of certain members of Local 601" of UE, and the related question of the adequacy of existing security requirements in defense plants, simply pin-pointed the immediate area of the Committee's investigation of Communist propaganda activities. As we have pointed out in our brief in *Emspak*, pp. 84-86, such a definition simply serves the same specifying function as administrative rules issued pursuant to general statutory standards.

Here, as in *Emspak* (see Govt. Br. pp. 78-95, 66-71), we contend that the Resolution, whether or not supplemented by the statement of the Committee's counsel, satisfies whatever standards of specificity apply to Congressional resolutions, and that petitioner has standing only to challenge the Resolution as applied in this case in the question which was addressed to him.

As applied to this petitioner as a member of Local 601 and a field organizer for the national organization of UE, a labor union which was the collective bargaining agent in important electronics factories, the Committee was entitled as a minimum to ascertain to what extent the union leadership was comprised of Communists, how they had been recruited by the Party, and whether and to what extent and how they were utilizing their positions of union leadership to recruit others into the Communist Party or otherwise to create acceptance of the Party's propaganda and objectives. Under any theory of the Committee's power to investigate Communist propaganda, it was empowered to require petitioner to answer the threshhold question of whether he was a past or present member of the Communist Party.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment below should be affirmed.

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vague and subjective inquiry of unlimited scope such as no Federal court has allowed into the constitution and proceedings of a grand jury. In fairness, however, it probably should be read with the following demand for a hearing in which "to demonstrate that the investigations under the President's Loyalty Order inquire into conduct of government employees including their activities as Grand Jurors or the activities as spouses of Grand Jurors in respect to issues like those involved in the present indictments."

The latter proposition describes a condition which, if proved, might require dismissal of the indictment. However, petitioner has failed to make the clear and positive showing which is required to justify a hearing into such a matter. Even if petitioner had asserted generally on information and belief that such investigation of government employees' discharge of their duties as grand jurors had occurred, without more, the showing would be insufficient to justify a hearing. *United States* v. *American Medical Association*, 26 F. Supp. 429 (D.D.C.). Petitioner has not even asserted on information and belief that such investigations have been made; rather, he has expressed merely a desire to inquire into that subject.

The inadequacy of petitioner's demand for a hearing is emphasized by the provisions of Rule 6 of the Federal Rules of Civil Procedure. Rule 6(d) provides that "no person other than the jurors may be present while the grand jury is deliberating or voting." Rule 6(e) provides that "Disclosure of

matters occurring before the grand jury *other than its deliberations and the vote of any juror* may be made to the attorneys for the government for use in the performance of their duties. Otherwise a juror * * * may disclose matters occurring before the grand jury only when so directed by the court preliminarily to or in connection with a judicial proceeding or when permitted by the court at the request of the defendant upon a showing that grounds may exist for a motion to dismiss the indictment because of matters occurring before the grand jury." (Emphasis supplied.) Under these provisions, a grand juror is forbidden, unless upon the order of the court, to disclose to the United States attorney or anyone else in the executive branch of the government how he or any other grand juror voted on a particular matter.

Moreover, the record which Rule 6(c) requires to be kept by the foreman or another juror designated by him is simply "a record of the number of jurors concurring in the finding of every indictment."

In view of these provisions designed to maintain the traditional secrecy of grand jurors' voting and deliberations in order to protect them from just the kind of harassment conjectured by the petitioner, he must make at least some kind of a showing that grand jurors and executive officers have participated in breaching these barriers of secrecy before he is entitled to a hearing such as he demanded. There is a presumption of regularity in grand jury proceedings, which petitioner would replace with a

presumption of illegal conduct. Courts have not embarked upon the delicate business of inquiring into grand jurors' mental processes and motives upon the basis of such gratuitous assumptions. The simple fact is that the petitioner's showing with respect to the members of the grand jury which indicted him is essentially that which was rejected in *Dennis* v. *United States, supra,* even with respect to a petit jury.

C. *The issue of possible bias loses significance in the present case because no grand jury would have failed to return an indictment.*

It is also apparent that the issue of possible bias in the grand jury cannot be considered except in relation to the question which was before the grand jury. Even as the petitioner states the facts, there was clearly a proper basis for indictment, that is, a *prima facie* case showing that petitioner had refused to answer a pertinent question. The significant evidence before the grand jury, indeed, the only significant evidence, was the transcript of what happened before the Committee. That transcript showed that petitioner was asked, "Are you now or have you ever been a member of the Communist Party?" (R. 97). The transcript also showed, at the very least, that there was a *prima facie* basis for concluding that he had refused to answer those questions, within the meaning of the contempt statute. It is not, and never has been, the function of the grand jury to pass on the subtler considerations

which the petitioner is urging in this Court as determining whether there was a refusal to answer. Cf. Orfield, *Criminal Procedure from Arrest to Appeal* (1947), 144. A grand jury which, on a written record, decides that there is probable cause to find guilt in a case where three judges of the court below (sitting *en banc*), on the same written record, decide that there is in fact guilt, cannot be said to have been misled by bias.

There are a number of cases which hold that defects in the organization of a grand jury are not a basis for attacking an indictment unless it appears that the accused was prejudiced. *Shreve* v. *United States*, 77 F. 2d 2 (C.A. 9), certiorari denied, 296 U.S. 654 (defendants charged with using mails to defraud held not entitled to abatement on ground that one of grand jurors was prejudiced where there was sufficient evidence in record to sustain charge made in indictment); *Wagner* v. *United States*, 67 F. 2d 656 (C.A. 9) (plea in abatement objecting to organization of grand jury without, *inter alia*, showing how defendants were injured or prejudiced held insufficient). See also *United States* v. *Parker*, 103 F. 2d 857, 859 (C.A. 3), certiorari denied, 307 U. S. 642; *Morrison* v. *United States*, 71 F. 2d 358, 359 (C.A. 5), certiorari denied, 293 U. S. 589; *United States* v. *Benson*, 31 Fed. 896, 901 (C.C.D. Calif.). While all of these cases except *Shreve* deal with technical defects in the grand jury organization, and *Shreve* appears to involve the qualifications of only one grand juror, this line of

a single debate upon a recommended contempt citation which, in *United States* v. *Rumely*, 345 U. S. 41, 47-48, was held to be an insufficient basis for finding a ratification of a committee's interpretation of its authority. Here, the ratification consists of repeated renewal of the Committee's existence, as well as the adoption by the House of contempt citations in this and other cases. More important, the House of Representatives and the Congress have enacted various statutes which are rooted at least in part in the Committee's (and the predecessor McCormack Committee's) investigations and reports. These statutes include the Foreign Agents Registration Act [15] (52 Stat. 631; 22 U. S. C. 611 *et seq.*), the Voorhis Act (54 Stat. 1201, 18 U. S. C. 2386) sponsored by a member of the Committee, and the Smith Act combined with the Alien Registration Act.[16] In particular, the registration provisions of the Subversive Control Act of 1950 have much of their origin in the Committee's work. Indeed, they originated in bills introduced by Representatives Mundt and Nixon who were members of the Committee. See H. Rep. 1844, 80th Cong., 2d Sess., and Sen. Rep. 1358, 81st Cong., 2d Sess., pp. 4-6. More recently, Congress has enacted the

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[15] The origin of the Foreign Agents Registration Act in the recommendations of the McCormack Committee was recognized by this Court in *Viereck* v. *United States*, 318 U.S. 236, 244.

[16] The relationship between these statutes and the investigations of the Committee is described in detail in the Government's brief in *Dennis* v. *United States*, No. 336, Oct. Term, 1950, pp. 176-192.

Communist Control Act of 1954 (Pub. Law, 637, 83d Cong., 2d Sess., 68 Stat. 775) which, *inter alia*, deprives of the protection and benefits of the National Labor Relations Act unions found to be Communist dominated. The report of the House Committee on Un-American activities on H. R. 9838, the House version of this recent legislation, states that it is based in large part upon the Committee's investigations, including the *Hearings Regarding Communist Infiltration of Labor Unions* in which this petitioner and Emspak were called as witnesses, H. Rep. 2651, 83d Cong., 2d Sess., p. 18.

This mass of legislation which Congress has enacted upon the basis of the Committee's investigations and those of other committees of the Congress also sufficiently disposes of the petitioner's argument that the Committee's operations, including the hearing involved here, serve only as an alleged exposure system, and have no bearing upon actual or potential legislation. Statements of members of the Committee that its purpose is merely to expose Communists cannot prevail over the authorization of House of Representatives in the Resolution to investigate "all other questions in relation thereto that would aid Congress in any necessary remedial legislation," and over the record of significant legislation largely based upon the Committee's work.

The petitioner also contends that the Committee was without authority under the Resolution to investigate Communist infiltration into defense industries. (Pet. Br. 18-27.) This contention presumably refers to the statement of the Committee's